NO. 90-1600

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA,

Petitioner

-VS-

TIMOTHY JOHN YELDER,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

ARTHUR PARKER, ATTORNEY
Counsel of Record for
the Respondent
210 Frank Nelson Bldg.
205 North 20th Street
Birmingham, AL 35203
(205) 324-9517

NO. 90-1600

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA,

Petitioner

-VS-

TIMOTHY JOHN YELDER,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

ARTHUR PARKER, ATTORNEY
Counsel of Record for
the Respondent
210 Frank Nelson Bldg.
205 North 20th Street
Birmingham, AL 35203
(205) 324-9517

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX "A"

TABLE OF AUTHORITIES

Page No.

Batson v. Kentucky,
476 U.S. 79, 90 L.Ed.2d 69,
106 S.Ct. 1712 (1986) 5

Edmondson v. Leesville, etc.,
____ U.S. ____, 111 S.Ct. 2077 (1991) 4

Powers v. Ohio,
499 U.S. ____, 111 S.Ct. 1364 (1991) 3

Strauder v. West Virginia,
100 U.S. 303, 25 L.Ed. 664 5

Strickland v. Washington,
466 U.S. 668 (1984) 7

Yelder v. State,
575 So.2d 131, 139 (Ala.Cr.App. 1990) 2

Constitution of the United States:

Sixth Amendment 7

Fourteenth Amendment 5

STATEMENT OF THE CASE

The Statement of The Case as set out in Petitioner's brief and Appendix is correct; however, the Respondent Yelder adds thereto the following:

The Respondent Yelder was convicted of rape, burglary and robbery in the Circuit Court of Montgomery County, Alabama, and sentenced to a total of life imprisonment plus seventy-five (75) years on the charges; Ex parte Yelder, 575 So.2d 137, 138 (Ala. 1991). Yelder is a black man and the alleged victim is a white woman (Motion For New Trial, R. 4).

Subsequent to the opinion of the Supreme Court of Alabama in this case wherein the case was ordered remanded with directions to the trial court to hold a Batson hearing, the Petitioner requested stays from the Supreme Court of Alabama, the Alabama Court of Criminal Appeals, Justice Kennedy and Justice Scalia; all of which were denied.

Even though on March 29, 1991, this case was remanded to the Circuit Court with directions that the trial court hold a hearing on the Batson question; to the date of filing this response, the Petitioner has not been required to give any race neutral explanation for striking seventeen (17) of eighteen (18) prospective black jurors in the trial of the cases (Appendix "A").

ARGUMENT

The Alabama Supreme Court in the instant case held "that the failure of trial counsel to make a timely Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant;" and thereby met the Strickland standard as to ineffective assistance of counsel.

The opinion of the Court is more succinct than anything Yelder might write, and therefore Yelder quotes the following reasoning for the holding of the Court:

> "[t]hat such an outcome-determinative test 'is simply not the proper criterion for measuring prejudice in the context of a Batson error,' . . . 'Applying this measure of prejudice to a Batson error would be, in effect, requiring the appellant to prove that, had blacks not been unfairly removed from his jury, the factfinder might have acquitted him!"
>
> "If an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that Batson condemns."
>
> "Strickland was decided two years before Batson, so it did not anticipate claims of alleged ineffectiveness in the context of the Batson issue. Had Strickland anticipated that issue, we are certain it would have included that issue as one of those in regard to which prejudice is presumed. We need not await enlargement of Strickland by the federal courts to hold that prejudice is presumed where Batson violations are established in the context of a charge of ineffective counsel.

The Petitioner argues in brief beginning at Page 14:

"The holding of the Alabama Supreme Court should be overruled by this Court because the failure to make a Batson objection is not a case where prejudice should be presumed."

"Prejudice has been presumed only in cases where a fundamental right has been denied such as the right to counsel or the right to appeal. . . . These are cases where the right denied was necessary to the truth finding function of a trial. The failure of a defendant's trial counsel to make a Batson objection does not rise to the level of a denial of a fundamental right." (Citations omitted).

The language of this Honorable Court in Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364 (1991), completely vitiates Petitioner's argument. The Court held:

> "The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. . . . This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process . . . and places the fairness of a criminal proceeding in doubt." (Citations omitted).
>
> "A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings."

"If the defendant has no right to object to the prosecutor's improper exclusion of jurors, and if the trial court has no duty to make a prompt inquiry when the defendant shows, by adequate grounds, a likelihood of impropriety in the exercise of a challenge, there arise legitimate doubts that the jury has been chosen by proper means."

"Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race."

"Petitioner has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction."

". . . [a]nd that, where racial bias is likely to influence a jury, an inquiry must be made into such bias." (Citations omitted).

"The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition." (Citations omitted).

The Court in Powers then determined that under the Equal Protection Clause, a criminal defendant may object to race based exclusions of jurors through peremptory challenges. Under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

In the case of Edmonson v. Leesville, etc., ____ U.S. ____, 111 S.Ct. 2077 (1991), this Honorable Court extended the Batson rule to include a private litigant in a civil case may not use peremptory challenges to exclude jurors on

account of race, and reaffirmed Powers v. Ohio, supra.

It is apparent that the principle announced in Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed.664, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, was reaffirmed in Batson v. Kentucky, 476 U.S. 79 (1986), and the same principle has been reaffirmed in Powers v. Ohio, supra, and Edmondson v. Leesville, supra.

It is abundantly clear that Yelder, a black man accused and tried for rape, robbery and burglary as to an alleged white victim, was deprived of his fundamental right - his constitutional right to equal protection under the Fourteenth Amendment to the United States Constitution - when the Petitioner peremptorily challenged 17 of 18 black prospective jurors as obviously race based exclusions of said jurors. The Petitioner has yet failed to give any race neutral explanation for said peremptory challenges.

Finally, the Petitioner argues that:

> "Under Yelder, a defendant's attorney must make a Batson objection to the racial composition of the jury even though it might not be in his client's best interest to make such an objection since the failure to make a Batson objection to a prima facie case of purposeful discrimination is presumptively prejudicial under Strickland . . ."

Therefore:

> "[in] every case where a prima facie case of purposeful discrimination exists under Batson, the defendant's attorney has to make a Batson objection under Yelder . . ."

Or he:

> "[d]eprives a defendant of his Sixth Amendment right to effective representation of counsel."

This argument of Petitioner is flawed for it is basic that an attorney should be straight forward and honest with his client and with the Court, and could easily ascertain whether the Equal Protection Clause was violated in the jury selection process. It would not be expected that this would be necessary except in rare instances. As quoted aforesaid, this Court has stated in Powers v. Ohio, supra:

> "That where racial bias is likely to influence a jury, an inquiry must be made into such bias."

And:

> "The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition."

As noted in a Batson footnote at Page 89:

> "Certainly, this Court may assume that trial judges, in supervising voir dire in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination."

Any defendant's attorney who is straight forward and honest with his client and the trial court as to his

acceptance of jurors on a race neutral basis cannot be ineffective in his representation of his client.

Yelder was denied equal protection under the Fourteenth Amendment when the Petitioner used peremptory challenges to exclude 17 of 18 blacks from the jury which tried Yelder. This was purposeful discrimination in the selection of the jury by the Petitioner.

Yelder's trial attorney (who is not his appellate attorney) failed to raise this constitutional Batson issue. Therefore, the Supreme Court of Alabama has held under Strickland v. Washington, 466 U.S. 668 (1984), that trial counsel's performance was deficient in that trial counsel made serious errors which deprived Yelder of counsel guaranteed by the Sixth Amendment. The Supreme Court of Alabama then properly held that the failure of trial counsel to make that timely Batson objection to a prima facie case of purposeful discrimination by the State in the way the jury was struck, was presumptively prejudicial to Yelder and satisfied the Strickland test as to ineffective assistance of counsel.

For the reasons above stated, the Supreme Court of Alabama ruled consistently with the Constitution of the United States and the law as laid down by the cases cited herein. The Petitioner's Petition For Writ of Certiorari should be denied.

CONCLUSION

The Supreme Court of Alabama correctly decided the issue herein and stated the following:

> "[t]he Strickland test for prejudice, excluding those instances of presumed prejudice, is outcome-determinative in nature; that is, it must appear that, absent the lawyer's error, there is a reasonable probability that the result of the trial would have been different . . . such an outcome-determinative test 'is simply not the proper criterion for measuring prejudice in the context of a Batson error,' . . . 'Applying this measure of prejudice to a Batson error would be, in effect, requiring the appellant to prove that, had blacks not been unfairly removed from his jury, the factfinder might have acquited him!"

In Batson, supra, it was held that:

> "[t]he Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors [citations omitted], so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."

> "If an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that Batson condemns." Yelder, supra.

Therefore:

> "[t]he failure of trial counsel to make a timely Batson objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant."

Petitioner's Petition For Writ of Certiorari should be denied.

Respectfully submitted,

ARTHUR PARKER
Attorney for Respondent
210 Frank Nelson Bldg.
205 North 20th Street
Birmingham, AL 35203
(205) 324-9517

CERTIFICATE OF SERVICE

I, Arthur Parker, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 2 day of July, 1991, I did serve a copy of this brief in opposition to Petitioner's Petition For Writ of Certiorari on Petitioner, by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Petitioner as follows:

Honorable P. David Bjurberg
Assistant Attorney General
for the State of Alabama
Office of the Attorney General
Criminal Appeals Division
11 South Union Street
Montgomery, AL 36130

I further certify I have served all parties required to be served.

ARTHUR PARKER
Attorney for Respondent

APPENDIX "A"

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

445 DEXTER AVENUE, JUDICIAL BUILDING

MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

June 6, 1991

Lane W. Mann
Clerk
Barbara P. Lindsey
Assistant Clerk
(205) 242-4590

Hon. Debbie Hackett
Circuit Clerk, Montgomery County
County Courthouse
Montgomery, AL 36192

Re: 3 Div. 95
Timothy John Yelder vs. State of Alabama
Montgomery Circuit Court No. CC88-1544PH; 1545PH; 1546PH

Dear Debbie:

The above referenced appeal has been pending in the Court of Criminal Appeals since December 16, 1988. On March 29, 1991, this case was remanded to the Circuit Court with directions that the trial court hold a hearing on the Batson question in compliance with the direction of the Supreme Court of Alabama in Ex parte Yelder, [Ms. 89-1540, January 11, 1991] __ So2d __(Ala. 1991). To date, this Court has not received the Circuit Court's return to remand.

In the event you have everything required to file the return to remand, the Court requests that you please do so at your earliest convenience. If the Circuit Court has not yet taken all the action required to permit filing of the return to remand, I am, by copy of this letter, advising the trial judge that the Court of Criminal Appeals respectfully requests that all action required be taken in sufficient time to permit filing of the return within 42 days (by July 19, 1991), so that this appeal can be concluded.

Please let me know if you have any questions.

Sincerely yours,

Lane W. Mann, Clerk
Court of Criminal Appeals of Alabama

LWM/kl
cc: Joseph Phelps, Circuit Judge
Mary Lambert, Court Reporter
Arthur Parker, Esquire
R. B. Jones, Esquire
Beth Jackson Hughes, Assistant Attorney General